Seminar Series on Private International Law

Seminar 11 JULY 2007, 5-7pm

West Tankers: Anti-Suit Injunctions to Protect Arbitration Agreements

The Reference of the House of Lords for a Preliminary Ruling by the European Court of Justice on the Scope of Regulation 44/2001 (Brussels I)

I. Introduction

On 27 February the House of Lords referred the case of *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA & Others [2007] UKHL 4* to the European Court of Justice for a preliminary ruling. The question raised is whether Regulation 44/2001 permits anti-suit injunctions to protect an arbitration agreement.

This discussion note is intended to introduce the case referred to the European Court and to highlight some the findings in relation to the tension between arbitration and Regulation 44/2001 in the Heidelberg 2007 Report on the application of the Regulation in the Member States

II. The Reference of the House of Lords in *West Tankers*

Facts in the case

A vessel owned by West Tankers, Inc. and chartered to an Italian company (ERG) collided with a jetty owned by ERG at Syracuse in Italy, causing damage. Pursuant to their arbitration agreement, ERG brought arbitration proceedings against West Tankers in London under English law to cover policy excess it claimed on its insurers. Tankers counterclaimed that it was not liable for any damage.

ERG's insurers brought proceedings in *delict* against West Tankers before a court in Syracuse to recover the amounts paid to ERG under its policy coverage. Jurisdiction was based on Article 5(3) of the Brussels Regulation which provides for the jurisdiction

in matters relating to tort or *delict* of the courts of the Member State in which the harmful event occurred.

In turn, Tankers commenced proceedings seeking a declaration that, among other issues, the insurers were bound by the arbitration agreement between Tankers and ERG, and requesting an injunction to discontinue the proceedings in Italy. Colman, J found in favour of West Tankers based on the decision in *TTMI v New India Assurance Co Ltd* [2005] 1 Lloyd's Rep 67.

The case was then brought before the House of Lords which was obligated to refer the case to the ECJ for a preliminary reference on the issue of whether a court of a Member State may grant an injunction against a person bound by an arbitration agreement to restrain him from commencing or prosecuting proceedings in breach of the agreement in a court of another Member State which has jurisdiction to entertain the proceedings under the Regulation.

Lord Hoffman's observations

Lord Hoffman began by citing *Gasser* and *Turner v Grovit* for the proposition that the Regulation provided a full set of uniform rules for the allocation of jurisdiction between Member States and that the national courts had to trust each other to apply those rules correctly.

However, as the Regulation explicitly excludes arbitration from its scope under Article 1(2)(d), it would be improper to permit a Member State to take jurisdiction contrary to an arbitration agreement, especially in light of the customary reasons for choosing arbitration over national court procedures, i.e. neutrality, availability of legal services and privacy.

Furthermore, not only arbitration as such is excluded from the purview of the Regulation, but also court proceedings in which the subject matter is arbitration. *See* C-190/89*,* Marc Rich v Impianti [ECJ]. The subject matter is arbitration if the proceedings serve to protect the right to have the dispute settled by arbitration. *See* C-391/95, Van Uden Maritime BV v Deco-Line. As the purpose of the proceedings was to protect West Tankers contractual right to arbitrate, the case clearly fell outside the scope of the Regulation.

The argument in opposition was that any court order in any proceedings which constrains a party's ability to invoke jurisdiction under the Regulation amounts to indirect interference and is impermissible under the Regulation.

Lord Hoffman disagreed with this argument, calling it 'divorced from reality' in that it fails to consider the practicalities of arbitration, such as time and cost effectiveness, as well as well as informality and privacy. He stressed the importance of party autonomy and provided evidence of prior UK court decisions exercising jurisdiction in this way. *See* Pena Copper Mines Ltd v Rio Tinto Co Ltd (1911) 105 LT 846.

Finally, he noted that the Member States should be able to provide arbitration seats that are capable of effectively ensuring that parties will not act in breach of their arbitration

agreements, else parties will choose to go to other countries that can provide such assurances.

The impact of the impending ECJ decision

If the ECJ disallows the injunction, not only will West Tankers be forced to litigate in Italy, but it may also potentially lead other national courts to disregard forum selection clauses in arbitration agreements contrary to the very purpose of such agreements, and may even result in the decreased use of European centres of arbitration.

III. The Heidelberg 2007 Report on the application of Regulation 44/2001

Introduction

In 2006 the British Institute cooperated in a European Commission funded project coordinated by Professor Burkhard Hess of the Institute for Private International Law (Heidelberg University, Germany) evaluating the application of Regulation 44/2001 in the Member States.

The British Institute prepared the report for England and Wales with the assistance of the Commercial Court Users Committee and HM Court Service. The specific objective of the study was to conduct an empirical analysis of the application of the Regulation to date.

The project has resulted in the production of a comprehensive report that is based on a comparative analysis of the national reports and an analysis of possible amendments to Regulation 44/2001. The European Commission is to report before long on the functioning of the Regulation (in accordance with Article 73 of the Regulation) to the European Parliament, the Council and the Economic and Social Committee.

The report addresses the issue of arbitration. Below, we provide an overview of the relevant findings and suggestions of the Report with a view to facilitating discussion during the seminar of 11 July.

Issues reported in the Member States

The Member State reports clearly demonstrated an unwillingness to extend Regulation 44/2001 to arbitration; however, the following issues need to be addressed:

1. Enforcement of an arbitration agreement, including declaratory judgments on validity and anti-suit injunctions
2. Ancillary and supporting proceedings of national courts to arbitration
3. Restrictions to recognise judgments that are incompatible with arbitral awards
4. Cost decisions of courts ancillary to arbitration proceedings

Suggested Action

Regarding the first issue:

It was suggested that in order to combat the risk of parallel proceedings and conflicting judgments, the exclusion of arbitration under Article 1(2)(d) should be deleted while at the same time retaining the prevalence of the New York Convention under Article 71 of the Regulation.

Hess explains that arbitration proceedings are not considered 'court' proceedings nor do arbitral awards qualify as 'judgments' and hence Article 1(2)(d) only ever had a declaratory impact in the first place.

Court proceedings supporting arbitration in civil and commercial matters would still be covered by the Regulation thereby allowing a judgment on the validity of an arbitration agreement to be recognised under Article 32.

Deleting Article 1(2)(d) would also consequently end the possibility of anti-suit injunctions and would put litigation and arbitration on the same footing. However, a party relying on the validity of an arbitration clause could still rely on such in cases where a civil court confirmed its validity because those judgments would be recognised under the Regulation.

Regarding the second issue:

The deletion of Article 1(2)(d) would also extend the scope of the Regulation to ancillary measures, i.e. the appointment of an arbitrator or the determination of the place of arbitration).

Additionally, provisional measures of national courts in support of arbitration proceedings would also fall under Article 31 of the Regulation and could be granted by all national courts under the jurisdiction provisions in Articles 2 to 26, thereby extending the limiting concept in *van Uden* (which only allowed provisional measures under Article 31).

The implementation of additional measures has also been suggested:

a) *Professor van Houtte*: expand Article 22 to include an exclusive head of jurisdiction for ancillary proceedings in the state court of the seat of arbitration
    - Problems include:
        - Arbitration agreements often don't determine the place of arbitration
        - Extending exclusive heads of jurisdiction would deviate from the general jurisdiction of the defendant's domicile
        - Lack of uniform definition of seat of the arbitral tribunal
    - Hess concludes that providing for exclusive jurisdiction in this area is not a good idea.

b) Add a specific head of jurisdiction for ancillary proceedings under Article 5
    - Problem: issues concerning the place of arbitration would still be prevalent and therefore this proposition is ill-advised as well.

c) Add a “true arbitration exception” to the Regulation which would directly address the issues of validity and legal effects of arbitration clauses
    - Problems include:
        - Direct overlap with Article II of the New York Convention
        - The exception would apply to commercial arbitration, as well as arbitration in consumer matters
        - A concurrent restriction or amendment of Article 1(2)(d) of the Rome Convention would also be required
        - Idea of competence-competence: arbitral tribunal would be exclusively competent to decide validity of an agreement (this is a foreign concept to many Member States)
        - Means that arbitration would be a matter of Community law

Regarding the third issue:

To avoid the problem of inconsistent judgments, some have proposed the following:

a) Assimilation of arbitral awards to judgments
    - Relates to question of mutual trust
    - The diversity of arbitration proceedings means that some form of judicial control over procedural fairness would still be necessary (and is contemplated under Article V of the NYC58) but such control would also delay proceedings under Article 43.

b) Inclusion of arbitral proceedings in the grounds for non-recognition of Article 34(3) and (4)
    - Problem: currently, many Member States engage in the practice of recognising judgments given despite the existence of an arbitration agreement (i.e. France) and no including such agreements in the grounds for non-recognition would drastically change things

Conclusion of the Heidelberg Report

Currently, the report concludes that it would be unwise to change the present situation through amendment or deletion. However, it is necessary that the problems with the Regulation as it relates to arbitration be addressed more fully and comprehensively.

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